FCC 96-376

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 34(a)(1) of the	)	
Public Utility Holding Company Act of 1935,	)	GC Docket No. 96-101
as added by Section 103 of the	)	
Telecommunications Act of 1996	)	

REPORT AND ORDER

Adopted: September 12, 1996 Released: September 12, 1996

By the Commission:

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I. Introduction

1. In this order, we adopt regulations to implement new Section 34(a)(1) of the Public Utility Holding Company Act of 1935 (PUHCA).[1] Under new Section 34, registered public utility holding companies may enter the telecommunications industry without prior Securities and Exchange Commission (SEC) approval by acquiring or maintaining an interest in an "exempt telecommunications company" (ETC).[2] Moreover, exempt public utility holding companies, by owning or acquiring an interest in an ETC, may now acquire a "safe harbor" from potential SEC regulation under PUHCA Section 3(a).[3] The new law vests the Commission with jurisdiction to determine whether a company warrants ETC status based on specific statutory criteria.

II. Background

2. As explained in the notice of proposed rulemaking (NPRM),[4] Congress designed PUHCA to prevent financial abuse among public utility holding companies and their affiliates.[5] PUHCA accomplished this goal by, among other things, restricting the activities and investments that utility holding companies are permitted to make outside of their core public utility businesses.[6] Prior to the Telecommunications Act of 1996, the provisions of PUHCA strongly deterred entry by registered public utility holding companies into the

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[1] 15 U.S.C. § 79 *et seq.*, as added by Section 103 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[2] *See* PUHCA § 34(d).

[3] *See* PUHCA § 34(c).

[4] *In re Implementation of Section 34(a)(1) of the Public Utility Holding Company Act of 1935, as added by the Telecommunications Act of 1996, Notice of Proposed Rulemaking*, GC Docket No. 96-101, 61 Fed. Reg. 24743-01 (1996).

[5] *Id., citing Arcadia, Ohio v. Ohio Power*, 498 U.S. 73, 87 (1990) (Stevens, J. concurring) (citations omitted).

[6] Under PUHCA, there are two types of public utility holding companies: registered and exempt. As a presumptive matter, all public utility holding companies are considered to be "*registered*" under the terms of PUHCA. Registered public utility holding companies must comply with the restrictions contained in PUHCA and are subject to regulation by the SEC. However, if a public utility holding company satisfies one of the five statutory exemptions contained in Section 3(a) of PUHCA, 15 U.S.C. § 79(d), (as all but fifteen utilities do), then that company is considered to be an *exempt* public utility holding company, because that company is generally exempt from the regulatory restrictions of PUHCA and regulation by the SEC.

telecommunications industry.[7] Somewhat anomalously, however, utilities that are not registered public utility holding companies have always been free to enter the telecommunications industry without prior SEC approval, regardless of their size or scope.

3. Section 103 of the Telecommunications Act of 1996, which adds new PUHCA Section 34(a)(1), ends this disparate treatment among different types of utility companies by allowing previously restricted holding companies to enter telecommunications industries without prior SEC permission through the acquisition or maintenance of an interest in an "exempt telecommunications company." Under Section 34(a)(1), an ETC is any person determined by the Commission to be engaged directly or indirectly, wherever located, through one or more affiliates (as defined in Section 2(a)(11)(B) of PUHCA[8]), and exclusively in the business of providing one or more of the following: (A) telecommunications services[9]; (B) information services[10]; (C) other services or products subject to the jurisdiction of the Commission; or (D) products or services that are related or incidental to the provision of a product or service described in (A), (B), or (C).

4. Section 34(a)(1) provides that an applicant who has applied in good faith for a determination of ETC status is deemed an ETC until the Commission makes its determination. Section 34(a)(1) requires the Commission to render this determination within 60 days of the receipt of an application. Section 34(a)(1) also requires the Commission to notify the SEC whenever it determines that a person is an ETC. Finally, Section 34(a)(1) requires the Commission to promulgate rules implementing the procedure for determining ETC status within one year of the date of enactment of the Telecommunications Act of 1996.

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[7] *See* PUHCA §§ 3(a), 11(b)(1).

[8] PUHCA § 2(a)(11)(B) defines "affiliate" as "any company 5 per centum or more of whose outstanding voting securities are owned, controlled, or held with power to vote, directly or indirectly, by such specified company."

[9] *See* Communications Act of 1934 § (3)(51), as added by the Telecommunications Act of 1996, which provides that the term "telecommunications service" means the "offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used to transmit the telecommunications service."

[10] *See* Communications Act of 1934 § (3)(41), as added by the Telecommunications Act of 1996, which provides that the term "information service" means the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telephone system or the management of a telecommunications service."

5. In the NPRM, the Commission proposed to implement Section 34(a)(1) by providing a simple procedure for ETC determination, under which applicants briefly describe their planned activities and certify that they satisfy the specific statutory requirements and any applicable Commission regulations. The Commission stated that because it believes that its responsibilities under Section 34(a)(1) are limited to whether the applicant meets the express statutory criteria for ETC status, an ETC determination "should not involve an inquiry into the public interest merits of entry by the applicant."[11] The Commission further stated that neither the public interest nor the intent of Congress would be served if this process became a regulatory barrier to significant new entry into the telecommunications industry.[12] Accordingly, the proposed rules were limited to the filing requirements and procedures for persons seeking exempt telecommunications company status. The Commission stated that it believed this to be the best approach to expedite Congress's policy of allowing holding companies to become vigorous competitors in the telecommunications industry and thus promote the public interest.[13]

6. The Commission solicited comment on the issues raised in the NPRM. Eleven parties filed comments and seven parties filed reply comments. A list of the commenters is provided in Appendix B.

III. Discussion

A. Scope of ETC Inquiry

1. The NPRM

7. In the NPRM, the Commission cited its earlier holding that its responsibilities under Section 34(a)(1) do not appear to extend beyond a determination of whether an applicant complies with the limited certification criteria enumerated above.[14] The Commission reasoned that this conclusion is evident not only from the unambiguous language of Section 34(a)(1), but from other provisions of Section 34, which preserve other statutory provisions where the scope of an ETC's activities can be evaluated. For example, Section 34(n) preserves the Commission's and affected states' authority to regulate the activities of an ETC under provisions of the Communications Act of 1934 and any applicable state laws. In

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[11] *See* NPRM at ¶ 2 (*citing* REPORT OF THE COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION ON S. 652, S. REP. NO. 23, 104th Cong., 1st Sess. at 8 (1995) ("*Senate Report*")).

[12] *Id.*

[13] *Id.*

[14] *See* NPRM at 15 (*citing Entergy Technology Company* (FCC 96-163, rel. April 12, 1996) ("*Entergy*")).

addition, Section 34(j) retains the jurisdiction of the Federal Energy Regulatory Commission (FERC) and state commissions to determine whether a public utility company may recover in its rates the costs of products or services purchased from or sold to an associate or affiliate company that is an ETC, regardless of whether such costs are incurred through the direct or indirect purchase or sale of products or services from the affiliate or associate company. Finally, Section 34(m) grants state commissions authority to conduct independent audits of public utility holding companies and their affiliates. The Commission requested comment on whether its existing interpretation of the scope of its inquiry under Section 34(a)(1) is correct.[15]

2. Comments

8. Several commenters support the Commission's interpretation of its responsibilities under Section 34(a)(1).[16] They agree that the scope of public comment and this agency's review is appropriately limited to whether an applicant meets the statutory requirements of Section 34 of PUHCA, and that substantive issues associated with the applicant's entry can be addressed in other proceedings.[17] Other commenters disagree, arguing that the Commission must examine the public interest merits of holding company entry into telecommunications markets.[18]

9. Other commenters argue that before the Commission can grant an application for ETC status, the Commission must impose safeguards to protect against potential cross-subsidization between the ETC and its holding company parent. For example, New Jersey argues that ETC applicants should be required to file more information because the initial application is the best place to collect information which various federal and state authorities may eventually require.[19] Other commenters argue that ETC applicants should simply certify

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[15] *Id.*

[16] *See* Southern Comments at 5-6; Entergy Comments at 5-6; New Jersey Comments at 2 (1996 Act simply eliminates the provision in PUHCA that registered holding company obtain SEC approval before entering the telecommunications business).

[17] *Id.*

[18] *See, e.g.*, CBT Comments at 2-3; ACSI Comments at 3-11 (if Commission does not consider whether granting ETC status to a particular utility affiliate will serve the public interest in fostering effective local competition, Commission reduces its function to that of a rubber stamp and renders the entire process meaningless).

[19] New Jersey Comments at 2-5.

that the safeguards protecting against cross-subsidization contained in Section 34 will be met.[20]

10. Third, two commenters argue that incumbent LECs must be treated in the same manner as ETCs. For example, BellSouth argues that while holding company entry will increase competition, such entry could have the undesired effect of slowing competition if the Commission and state commissions fail to adopt an approach of "regulatory parity."[21] Similarly, CBT argues that while Section 34 includes some safeguards against cross-subsidization, they are not the same as those currently applicable to incumbent LECs. CBT submits that as long as incumbent LECs must comply with the Commission's accounting safeguards, those same rules should be made equally applicable to the holding companies and their ETC affiliates.[22]

11. Finally, several commenters argue that the Commission should not permit a utility to enter a telecommunications market until it affirmatively demonstrates its compliance with the pole attachment requirements contained in Section 224 of the Communications Act of 1935, as added by Section 703 of the 1996 Act.[23] Other parties reject claims that pole attachment obligations should be incorporated into the ETC process as beyond the statutory mandate and the scope of this proceeding.[24] These parties argue that nothing in the plain language of Section 34(a)(1) suggests that pole access should be a factor in the determination of ETC status. Furthermore, they argue that issues relating to pole access are addressed comprehensively in Section 224, and implementation of these provisions are the subject of other, distinct rulemakings. Finally, these commenters contend that there are numerous infrastructure owners not subject to PUHCA restrictions on entry into telecommunications markets and it would be unfair and nonsensical to single out registered holding companies for special obligations relating to pole access in the ETC context.[25]

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[20] USTA Comments at 1-2; CBT at 5; *see also* ACSI Reply at 11.

[21] BellSouth Comments at 3-5.

[22] CBT Comments at 3, n.10.

[23] ACSI Comments at 3-10; ALTS Comments at 1-7; *see also* MCI Reply at 4; CBT Comments at 5 (public utility holding companies must make their poles, conduits, and right-of-way available to competing telecommunications service providers at least to the same extent and under the same terms and conditions as is required of incumbent LECs).

[24] Southern Reply at 6-7; Entergy Reply at 3-4.

[25] *Id.*

3. Discussion

12. After review, we reaffirm our original conclusion that the Section 34(a)(1) inquiry is a limited one. Contrary to some commenters' arguments, we do not believe that it is our role to examine the public interest merits of entry under Section 34(a)(1). Congress already concluded in enacting Section 103 that, as a general matter, competitive entry by public utility holding companies is in the public interest.[26] Indeed, the legislative history states that:

> *Allowing . . . holding companies to become vigorous competitors in the telecommunications industry is in the public interest.* Consumers are likely to benefit when more well-capitalized and experienced providers of telecommunications services actively compete. Competition to offer the same services may result in lower prices to consumers. Moreover, numerous competitors may offer consumers a wider choice of services and options.[27]

Moreover, as we previously recognized, and as commenters point out, to the extent particular transactions raise public interest concerns, Congress preserved state and federal jurisdiction to examine these issues in other, more appropriate, proceedings. For these reasons, we reject commenters' arguments in opposition to this point.

13. We also believe that commenters' arguments regarding potential cross-subsidization are misplaced. First, as we stated earlier, we believe our inquiry under the statute is limited to a determination as to whether an applicant meets the enumerated statutory criteria. In addition, there are other provisions in Section 34 which adequately protect against issues of cross-subsidization. For example, Section 34(j) retains the jurisdiction of FERC and state commissions to determine whether a public utility company may recover in its rates the costs of products or services purchased from or sold to an associate or affiliate company that is an ETC, regardless of whether such costs are incurred through the direct or indirect purchase or sale of products or services from the affiliate or associate company. Moreover, Section 34(e)(4) gives the SEC jurisdiction to ensure that costs are fairly and equitably allocated among companies that are associate companies of a registered holding company. Finally, Section 34(m) provides state commissions the authority to conduct independent audits of public utility holding companies and their affiliates.

14. We also reject BellSouth's and CBT's claim that we must either: (a) place the same regulatory restrictions on ETCs as we do on LECs; or, in the name of regulatory parity, (b) reduce the levels of reporting requirements currently imposed on LECs. First, generically

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[26] *See* Entergy Reply at 2-3; *see also* NEES Reply at 4.

[27] *Senate Report* at 7 (emphasis supplied).

grouping all ETCs as potential LECs oversimplifies the process and ignores the wide range of potential services that ETCs can provide. Indeed, the applications received to date generally involved services other than local exchange access services.[28] Second, as several commenters point out, to the extent that ETCs decide to compete for local loop service, they will inevitably have to compete with an incumbent, dominant LEC.[29] Finally, as mentioned above, because our statutory authority is limited, we do not believe that this proceeding is the appropriate forum to impose additional conditions on the ETC process.

15. Finally, we do not agree that pole attachment obligations should be incorporated into the ETC process. Again, this inquiry is beyond our limited responsibility under Section 34(a)(1). Pole attachments is an issue generic to all utilities as well as LECs, so whether or not an entity is an ETC has no bearing on whether that entity must make its poles available in a non-discriminatory manner. Accordingly, we believe that this issue is better addressed in other proceedings.[30] We see no reason to visit this issue in this proceeding.

B. Application Process

1. General Procedures

a. The NPRM

16. In the NPRM, the Commission noted that PUHCA Section 34(a)(1) is similar to the "exempt wholesale generator" provision of PUHCA Section 32 which permits, *inter alia*, public utility holding companies to enter into the independent power production business.[31] FERC, the federal agency responsible for implementing PUHCA Section 32, interpreted that statute as intended to give it only circumscribed authority, and therefore implemented a procedure whereby an applicant need only briefly describe its planned

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[28] *See, e.g., Entergy*; *Southern Information Holding Company et al.*, DA 96-951 (rel. June 14, 1996); *Allegheny Communications Connect, Inc.*, DA 96-953 (rel. June 14, 1996).

[29] Southern Reply at 12; Entergy Reply at 7-8.

[30] *See, e.g., In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report & Order* at ¶¶ 1119-1249 (FCC Docket No. 96-235, rel. Aug. 8, 1996).

[31] *See* PUHCA Section 32, as added by Section 711 of the Energy Policy Act of 1992, 15 U.S.C. § 79z-5a.

activities and certify that it satisfies the requisite statutory criteria.[32] In the NPRM, the Commission stated that it believed that similar filing requirements should be required under Section 34(a)(1).[33]

17. Accordingly, the draft rules proposed, first, that an applicant provide a brief description of the planned activities of the eligible company or companies owned or operated by the applicant. Second, the rules proposed that any person seeking ETC status (applicant) must file a sworn statement, by a representative legally authorized to bind the applicant, attesting to any facts or representations presented to demonstrate eligibility for ETC status, including a representation that the applicant is engaged directly, or indirectly, wherever located, through one or more affiliates (as defined in Section 2(a)(11)(B) of the Public Utility Holding Company Act of 1935), and exclusively in the business of providing: (A) telecommunications services; (B) information services; (C) other services or products subject to the jurisdiction of the Commission; or (D) products or services that are related or incidental to the provision of a product or service described in (A), (B), or (C). Finally, the draft rules proposed to require an applicant (as all Commission applicants in all contexts) to provide a sworn statement, by a representative legally authorized to bind the applicant, certifying that the applicant satisfies Part 1, Subpart P, of the Commission's regulations, 47 C.F.R. §§ 1.2001, *et seq.*, regarding the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 862.

b. Comments

18. Many commenters focus on the requirement contained in the proposed rules that applicants provide a "brief description" of their planned activities.[34] For example, Southwestern Bell argues that applicants should be required to file more than a "brief description" of their planned activities in order to allow states to determine whether their participation in the FCC proceedings is warranted and to help states carry out their own responsibilities under the 1996 Act.[35]

19. BellSouth also criticizes the proposed requirement that applicants need only provide a "brief description" of their planned activities. BellSouth disputes the Commission's holding in *Entergy* that there is no parallel concept to the EWG requirement that facilities

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[32] *See Filing and Ministerial Procedures for Persons Seeking Exempt Wholesale Generator Status, Order No. 550*, 58 Fed. Reg. 8,897-01 (February 18, 1993); *order on reh'g, Order No. 550-A*, 58 Fed. Reg. 21,250 (April 20, 1993); *see also* 18 C.F.R. § 365.1 *et seq.*

[33] NPRM at ¶ 9.

[34] *See, e.g.,* Southwestern Bell Comments and BellSouth Comments.

[35] Southwestern Bell Comments at 2-3 (ETC applications should include a listing and description of the types of services that the ETC applicant plans to provide, and the geographic locations where the ETC applicant intends to provide them).

must fall within a specific definition of "eligible facilities." According to BellSouth, Section 34(a)(1) does contain a parallel concept, in that a determination of ETC status hinges on the definition and provision of "telecommunications services" and other services contemplated in the Act.[36]

20. Southern opposes these suggestions and urges the Commission to adopt the rules regarding descriptions of proposed activities in their proposed format.[37] Southern argues that the issue in the application process is whether the ETC's business activities fall within the scope of the categories contained in Section 34(a)(1). According to Southern, requiring extensive and extraneous detail concerning proposed activities would unnecessarily limit the ETC's flexibility and improperly and needlessly force the release of proprietary business information to competitors. Such a result would, in Southern's view, be contrary to the policies underlying the Act and should not be adopted.[38]

c. Discussion

21. We reject claims that we must require prospective applicants to file more than a brief description of their planned activities in order to demonstrate that they qualify for ETC status. Given the scope of our ETC inquiry, it is only necessary that applicants be required to provide information sufficient for the Commission to make an informed decision. Our proposed rules are designed to do exactly that. Requiring anything more would unduly place additional burdens on applicants without providing any benefits to the public. On the other hand, we stated that applicants must do more than recite the statutory definition for ETC status. Rather, the "brief description" contemplated by our rules must contain facts that are sufficient for the Commission to determine that the applicant meets the statutory criteria. To the extent applications are inadequate in this respect, the Commission may either deny the application or request that the applicant provide additional information.

22. We also reject BellSouth's argument that additional information is required so that affected states can determine whether they should participate in a particular ETC proceeding. Section 1.4002 of our rules will specifically require ETC applicants to serve a copy of their application on affected state commissions.[39] Given that public comment in these

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[36] BellSouth Comments at 12-14 (ETC applications should provide, at minimum: (a) a description of the facilities which will be utilized in the provision of the described service; (b) an indication of whether the facilities will be those of the ETC or its affiliate; and (c) an indication of which, if any, facilities are owned by the holding company (or its affiliates other than the applicant) with which the applicant is affiliated).

[37] Southern Reply at 7-8.

[38] *Id.*

[39] See discussion in section III.B.5 below.

proceedings is limited to the adequacy or accuracy of the application, we believe that service upon state commissions should provide sufficient notice.

2. Compliance with the Statutory Definition

a. Comments

23. With regard to an applicant's compliance with the statutory definition, many commenters debate what it is to be exclusively "engaged" in the business of providing a permitted service. For example, BellSouth argues that the Commission should require that the applicant be formed for the exclusive purpose of providing the relevant services at the time it files its application with the Commission, but that the grant of ETC status be conditioned on the entity actually providing the service within a reasonable period of time.[40] Southern, however, urges the Commission to reject such an approach, contending that the condition urged by BellSouth would place an unwarranted burden upon ETCs to commence activities within some undefined "reasonable period of time" under peril of losing their ETC status. Such a condition, argues Southern, is likely to chill or hinder competition, rather than foster it, and therefore should not be adopted.[41]

24. Second, Entergy argues that there may be appropriate circumstances where the Commission should grant a determination of ETC status, even though the applicant at the time of filing is not "exclusively" engaged in permitted ETC activities.[42] Entergy notes that some telecommunications companies may engage in non-telecommunications activities that are not material to their overall business and which could easily be discontinued or divested without substantially disrupting business operations. Entergy argues that because it may not always be practical to accomplish such a divestiture prior to, or as a condition of, a proposed holding company investment, the Commission's inquiry should not be rigidly confined to an examination of the applicant's operation at the time the application is filed.[43]

25. Entergy proposes that the Commission require applicants to describe their proposed future business activities and the actions they propose to take, if appropriate, to divest (or otherwise discontinue) or limit their investment or participation in any non-telecommunications related activities that would not qualify as "related or incidental" within the meaning of Section 34(a)(1)(D). Moreover, Entergy argues that the terms "related and incidental" should receive a broad interpretation, so that entities that are predominantly telecommunications enterprises may not be excluded from ETC status. According to Entergy,

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[40] BellSouth Comments at 9-12.

[41] Southern Reply at 8-9.

[42] Entergy Comments at 6-7.

[43] *Id.*

in the event that such additional operations are to be divested, a statement by a representative legally authorized to bind the applicant would verify that divestiture of the non-telecommunications business components would be accomplished within a specified reasonable period of time and that, following such divestiture, the applicant would be qualified as an ETC and fully satisfy the requirements of 34(a)(1). Entergy further argues that if the investment by a registered holding company consists of a minority interest in a predominantly telecommunications enterprise where divestiture of the non-telecommunications portion of the business would not be reasonable or practicable or under the control of the registered holding company, such circumstances should be described by the applicant and the Commission should permit such investment without divestiture on the theory that such an interest would represent only an incidental activity and would be in furtherance of congressional intent.[44]

26. New Orleans disagrees with Entergy's argument.[45] New Orleans contends that under the plain language of the statute, Congress determined that an ETC must be "exclusively" in the business of providing telecommunications, information, or other related or incidental products or services.[46]

27. Cinergy argues that the rules should expressly permit an application to be filed "by, or on behalf of," one or more affiliate companies of a registered holding company, whether or not such companies are in existence at the time of the filing.[47] According to Cinergy, this is the same approach used by the SEC in its rules implementing the "foreign utility company" provisions of the Energy Policy Act of 1992.[48] BellSouth disagrees with Cinergy's proposal. According to BellSouth, Cinergy's proposal is contrary to the clear language of the 1996 Act. BellSouth argues that the Commission should not grant ETC status to unformed entities for the sole purpose of enabling a holding company to "bank" this status for potential future entities.[49]

b. Discussion

28. *Extent to which applicants must be currently engaged in ETC activities.* In *Entergy*, the Commission rejected the argument that under Section 34(a)(1), applicants must

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[44] *Id.* at 7-8.

[45] New Orleans Reply at 4-5.

[46] *Id.*

[47] Cinergy Comments at 2-3.

[48] *Id.*

[49] BellSouth Reply at 5.

actually be currently engaged in the telecommunications or information business before they may apply for ETC status. The Commission reasoned, based on the language, structure and purpose of Section 34, that an entity is "engaged in the business of providing" telecommunications or other covered activities if the entity is established for the exclusive purpose of providing such services at the time it files its application with this Commission.[50] We reaffirm our conclusion here.

29. In *Entergy,* we concluded that a contrary interpretation would be antithetic to Congress's intent in promulgating Section 34 as part of Part II of the Telecommunications Act of 1996, entitled "Development of Competitive Markets." As the Commission recognized, prior to the Telecommunications Act of 1996, the provisions of PUHCA strongly deterred entry by registered public utility holding companies into the telecommunications industry by requiring stringent regulatory oversight by the Securities and Exchange Commission.[51] By obtaining ETC status, holding companies can avoid prior SEC approval and quickly become vigorous competitors in the telecommunications industry, and, with such competition, bring more benefits to consumers.[52] Accordingly, the Commission concluded that adoption of the "actually engaged" interpretation would defeat the core purpose of Section 34, as such an interpretation would force registered holding companies to begin operations before they could file for ETC status. Under that approach, SEC pre-operations review would be required before seeking ETC status, which would effectively vitiate in major respects the purpose of the ETC provisions in the statute.[53]

30. Section 34(a)(1) only requires that an ETC "be engaged . . . in the business of providing" one or more permitted services. We believe that a company that has been formed for the purpose of providing such a service is engaged in that business for purposes of Section 34(a)(1). For example, a holding company may seek to form an ETC to participate in Commission spectrum auctions. While such a firm is not actually providing service, the acts

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[50] *Entergy* at ¶ 30.

[51] *See* PUHCA §§ 3(a); 11(b)(1).

[52] *See Senate Report* at 7-8.

[53] *Entergy* at ¶ 30. The Commission also noted that FERC was confronted with a similar question in the EWG context. There, parties requested a ruling that an applicant could obtain EWG status for a facility that is not yet planned as long as the applicant properly attests that any such future facility will be an eligible facility. The reason behind this argument, stated the parties, was that developers must often obtain determination of EWG status prior to construction in order to obtain financing. In response, FERC held that applicants may request a determination of EWG status for facilities that have not been built. *See Id.* at ¶ 30 n.33 (*citing Filing and Ministerial Procedures for Persons Seeking Exempt Wholesale Generator Status, Order No. 550*, 58 Fed. Reg. 8,897-01 (Feb. 18, 1993); *order on reh'g, Order No. 550-A*, 58 Fed. Reg. 21,250 (April 20, 1993)).

of incorporating, filing short-form applications, and bidding are all activities that involve "being engaged" in the business of telecommunications.

31. Against this backdrop, we reject BellSouth's argument that we condition ETC determinations to require ETCs to begin actually providing service within a specific period of time. We have no reason to believe that ETCs who are not yet actually providing service will unreasonably delay doing so. We believe that the imposition of such a requirement on an ETC -- or on any other lawful business for that matter -- could have a chilling effect on entry with no countervailing benefits. However, to the extent that parties in the future believe that an ETC determination may be a "sham," in that an ETC unreasonably delays engaging in permitted activities, then those parties may bring this information to the Commission's attention for appropriate action.[54]

32. *Treatment of firms not exclusively engaged in ETC activities.* We are also confronted with the question of the appropriate treatment of an acquisition of, or investment in, a telecommunications or information services provider which is not exclusively engaged in the business or providing telecommunications services, information services, other services or products subject to the Commission's jurisdiction, or products and services related or incidental thereto. Consistent with the clear congressional mandate that holding company entry into telecommunications markets promotes the public interest, in appropriate circumstances -- related to the relative size of the non-telecommunications or information services portion of the business and the firm's commitment to divest these assets -- grant of ETC status would likely be warranted, to the extent the firm otherwise meets the criteria for ETC status. However, as such a determination wholly depends on the facts of a specific case, we do not believe that it is appropriate for us to formulate a rule of general applicability in this proceeding. Rather, such issues will be addressed on a case-by-case basis as they arise.

33. Similarly, we also do not believe that we should formulate a rule of general applicability regarding Entergy's request that we grant ETC status where a registered holding company holds a minority interest in a predominantly telecommunications enterprise and divestiture of the non-telecommunications portion of the business would not be reasonable or practicable or under the control of the registered holding company. As in the situation discussed above, applicants must demonstrate on a case-specific basis that an activity falls within a permitted activity or is, at a minimum, "related or incidental thereto." However, unlike the situation above, we do not presently see circumstances where grant of ETC status would likely be appropriate in such a case.

34. Finally, we reject Cinergy's argument that the rules should expressly permit an application to be filed "by, or on behalf of," one or more affiliate companies of a registered holding company, whether or not such companies are in existence at the time of the filing. As BellSouth argues, Cinergy's argument runs contrary to the clear language of the 1996 Act:

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[54] See discussion in section III.D.2 below.

Section 34(a) provides that "No person shall be deemed to be an exempt telecommunications company under this Section *unless such person has applied* to the [Commission] for a determination under this paragraph." (Emphasis supplied.) The ETC, therefore, should, at a minimum, be in existence in order to apply. We similarly see no reason to allow firms to apply on behalf of other unrelated entities. It is the ETC that is required to apply. Accordingly, regardless of the reasons supporting the SEC's rules referred to by Cinergy,[55] Cinergy has not proffered any reason here that would lead us to a contrary conclusion.

3. Prior State Approval

a. The NPRM

35. The Commission recognized in the NPRM that we held in *Entergy* that our responsibilities do not extend beyond a determination of whether an applicant complies with the relatively limited certification criteria enumerated in Section 34(a).[56] Thus, we concluded, following our prior decision in *Entergy*, that under the plain language of the statute, PUHCA Section 34 does not require prior state approval as a condition precedent before we may make a determination of ETC status.[57]

b. Comments

36. New Orleans and CBT both argue that the Commission's rejection of calls for prior state approval in previous orders must be re-evaluated.[58] They argue that state approval must be obtained before an applicant may apply for a determination of ETC status. They recommend that documentation indicating that applicants have obtained the appropriate state approvals should accompany an ETC application, as this requirement would ensure that the state regulators had the opportunity to review the activities proposed by the applicant and decide if those activities are in the public interest, particularly as they relate to the ratepayers of the applicant's public utility affiliates. CBT also contends that while Section 34 may not explicitly condition the granting of ETC status on state approval of the proposed activity, it does not preclude the Commission from requiring such approval. According to CBT, requiring prior state approval would not impose a significant barrier to entry, because the Commission could rely on the public interest determinations of the state commissions which

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[55] Cinergy Comments at 2-3.

[56] *See* NPRM at ¶ 4.

[57] *See Entergy* at ¶¶ 21-28

[58] New Orleans Comments at 7-9; CBT Comments at 2-4. *See also* MCI Reply at 4.

are generally in a better position to assess the public interest impacts of entry on the constituents.[59]

37. Two commenters dispute these arguments.[60] They argue that the Commission has no authority under Section 34(a)(1) to make such an inquiry, because the application review process must, in accordance with Section 34(a)(1), be limited to a discrete inquiry by this Commission concerning the nature of the activities in which the applicant proposes to engage. Moreover, they argue that were it Congress's intent that issues concerning state review should be part of the application process, Section 34(a)(1) would have contained an indication to that effect. To the extent that Congress intended for there to be prior state review, these commenters contend that such concerns are provided for elsewhere in Section 34, in the 1996 Act, in PUHCA, or in other federal or state laws.[61]

c. Discussion

38. In *Entergy*, several parties argued that PUHCA requires ETC applicants to obtain prior state approval before they may file for a determination of ETC status. The Commission rejected this argument, finding that this position runs counter to the plain language of Section 34(a)(1).[62] We affirm that conclusion here.

39. Commenters based their arguments on Section 32 of PUHCA,[63] which permits holding companies to obtain "exempt wholesale generator" ("EWG") status. Unlike Section 34, however, Section 32 expressly makes state approval a prerequisite to the findings necessary for an EWG determination. Under the plain language of PUHCA Section 32, if an EWG seeks to utilize assets that are already in its holding company parent's rate-base, Congress required state approval as a condition precedent to a determination of EWG status.[64] Because PUHCA Section 34 differs from Section 32 in a number of material respects, it is apparent that, in contrast to the EWG context, state approval is not a prerequisite to a determination of ETC status. Most significantly, under Section 32, the state approval process is an integral part of whether a firm can be accorded EWG status. On the other hand, the plain language of Section 34 does not condition the grant of ETC status on the receipt of state approval in this circumstance. Indeed, unlike the EWG provision, where EWG status is

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[59] CBT Comments at 2-4.

[60] Southern Reply at 4-5; Entergy Reply at 4-5.

[61] *Id.*

[62] *See Entergy* at ¶¶ 21-28.

[63] 15 U.S.C. § 79z-5a.

[64] *Entergy* at ¶¶ 22-23.

directly linked to state-approved eligible facilities, there is no similar link, explicit or otherwise, between the grant of ETC status and state approval of asset sales to an ETC. Rather, our inquiry under the statute is limited to the four enumerated criteria set forth in Section 34(a)(1).[65]

40. Moreover, interpreting the statute to require or permit the Commission to require prior state approval would not further, and indeed would be inconsistent with, the purposes of Section 34. In this regard, we noted in *Entergy* that assets that were previously in the rate-base may not be the only assets by which an ETC might enter the telecommunications business. There are undoubtedly alternative means of entry, whether by the use of or acquisition of assets that are outside of a particular state's jurisdiction, that do not require that state's approval.[66] Moreover, as discussed in *Entergy*, to the extent state issues are raised, states' rights are well-preserved under other provisions of Section 34.[67]

41. Finally, Section 34 was intended to foster holding company entry into telecommunications markets, because such entry could "significantly promote and accelerate competition in telecommunications services and deployment of advanced networks" and could also result in lower prices and greater choice for consumers.[68] Requiring an applicant to obtain all state approvals -- including those that might only hypothetically be required -- would slow down holding company entry into telecommunications markets, and would frustrate Section 34's central purpose of removing PUHCA as a barrier to holding company entry into telecommunications markets.[69] Moreover, given that holding company entry as an ETC might be accomplished *independently* of assets over which the states have jurisdiction, we see no reason why state approval must be a condition precedent to obtaining a determination of ETC status.[70] Accordingly, as we recognized in *Entergy,* it would not be appropriate to use the ETC approval process as a backstop to those procedural avenues states currently have to address issues associated with utility company entry into telecommunications markets. Indeed, the Commission stated that to add prior state approval as a condition precedent to "the Commission's ETC approval process would appear to be unnecessary,

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[65] *Id.* at ¶ 25.

[66] *Id.* at ¶ 26.

[67] *Id.* at ¶ 28.

[68] *Id.* at ¶ 27.

[69] *Id.*

[70] *Id.*

redundant, and contrary to the explicit de-regulatory thrust of the Telecommunications Act of 1996."[71]

4. Consolidated Applications

a. The NPRM

42. The Commission also sought comment on whether it should adopt rules governing applications seeking ETC status filed by different entities that are or will be affiliates of a common holding company parent.[72] While the Act apparently contemplates that every entity seeking ETC status must apply to the Commission, the Commission saw no reason why this should require separate entities affiliated with the same holding company parent to seek ETC status through separate applications and proceedings. Such a process seems administratively wasteful and duplicative. Accordingly, the Commission proposed to allow multiple entities seeking ETC status that are affiliated with the same public utility holding company parent to seek a determination for all such entities through a single consolidated application. In such a case, the NPRM proposed that any consolidated application should contain for each affiliate sufficient information as required by our rules to make a separate ETC determination for that affiliate.[73]

b. Comments

43. Several commenters support the Commission's proposal to permit a single, consolidated application by one or more subsidiaries affiliated with the same holding company parent.[74] However, New Orleans argues that in instances where more than one holding company affiliate seeks ETC status, any consolidated application must contain adequate information regarding each affiliate, including the proposed activities of each. According to New Orleans, comprehensive or summary descriptions or representations would not permit the Commission to make necessary findings regarding each of the entities seeking ETC status.[75]

c. Discussion

44. As reflected in the support for this proposal, common sense dictates that we should allow multiple entities seeking ETC status that are affiliated with the same public

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[71] *Id.* at ¶ 28.

[72] NPRM at ¶ 11.

[73] *Id.*

[74] *See* Cinergy Comments at 2-3; Entergy Comments at 8-9.

[75] New Orleans Comments at 9.

utility holding company parent to seek a determination for all such entities through a single consolidated application. Nothing in the statute requires a contrary result. On the other hand, as New Orleans points out, the statute does require that we have sufficient information about each entity seeking ETC status to make a determination that the statutory criteria are met. We agree with New Orleans that comprehensive or summary descriptions or representations would not permit the Commission to make necessary findings regarding each of the entities seeking ETC status. Therefore, consistent with our earlier statement in the NPRM, the Commission will permit consolidated applications, but any such applications must contain, for each affiliate, sufficient information as required by our rules to make a separate ETC determination for that affiliate.

5. Service on other Agencies

a. The NPRM

45. The Commission asked parties to comment on whether the proposed rules should require applicants to serve a copy of their ETC application on the SEC and affected State commissions.[76] The Commission defined an affected State commission as the State commission of each state in which the ETC will be located or do business.[77] The Commission reasoned that although service of applications on the SEC and State commissions is not required by law, Section 34 of PUHCA specifically contemplates a role for the SEC and State commissions insofar as certain eligible companies are concerned. It also contemplates that the SEC be made aware of ETC determinations. The Commission therefore found no reason not to inform these agencies of pending ETC applications at an early stage, particularly since the copying and mailing costs associated with serving filings on the SEC and affected State commissions will be minimal.[78]

b. Comments

46. New Jersey endorses the proposed requirement that ETC applicants serve a copy of their application on the SEC and affected state commissions.[79] Entergy states that while it does not object to the Commission's proposal that applicants be required to serve a copy of their applications on affected state commissions, because the SEC has no authority to review ETC applications, no purpose would be achieved by requiring the filing of ETC

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[76] NPRM at ¶ 12.

[77] *Id.*

[78] *Id.*

[79] New Jersey Comments at 5.

applications with the SEC. [80] Entergy contends that it should be sufficient that the SEC is notified upon grant of an application pursuant to Section 1.4005 of the proposed rules. BellSouth disagrees with Entergy's position, however, noting that serving the SEC with the application is entirely appropriate given the SEC's otherwise plenary jurisdiction over holding companies.[81] Finally, CBT argues that in addition to requiring ETC applicants to serve a copy of their application on the SEC and affected state commissions, the Commission should also require applicants to file a copy of their application with FERC, since FERC retains certain rate authority under Section 34(j).[82]

c. Discussion

47. We agree with BellSouth and reject Entergy's argument that an ETC should not be required to file a copy of its application with the SEC. The SEC has plenary jurisdiction over holding companies, even though there is an increasing trend by Congress to permit holding companies to engage in businesses other than their core utility operations. Indeed, in this regard, we note that FERC's final rules for EWG status -- a policy designed to permit holding companies to invest in independent power production ventures without prior SEC approval -- also require persons seeking a determination of EWG status to file a copy with the SEC for essentially the same reasons we set forth in the NPRM.[83] Accordingly, we reject Entergy's claim that ETC applicants should not be required to file a courtesy copy of their application with the SEC.

48. On the other hand, we reject CBT's argument that we should require ETC applicants to file a copy of their application with FERC. First, unlike the SEC, Congress did not impose a statutory obligation to notify FERC whenever we make a determination of ETC status. Second, New Jersey specifically asked that it be served and one other state, Mississippi, has actually participated in an ETC proceeding.[84] In contrast, FERC has filed no request that applicants file an additional copy of their application with them, and, in the

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[80] Entergy Comments at 9-10.

[81] BellSouth Reply at 6-7.

[82] CBT Comments at 5-6.

[83] *See* 18 C.F.R. § 365.3(a).

[84] *See, e.g.*, New Jersey Comments at 5.

absence of such a request, we decline to impose the suggested requirement.[85] Thus, we will require service of applications on relevant state commissions but not on FERC.

C. Public Notice and Comment

1. The NPRM

49. In the NPRM, the Commission asked whether there should be a public notice and comment procedure for ETC applications.[86] The Commission noted that while staff had placed all of the applications received prior to issuing the NPRM on public notice for comment, there is no requirement in the 1996 Telecommunications Act that the Commission do so. On the other hand, the Commission also noted that neither is there any prohibition on the Commission's discretion to do so. The proposed rules therefore provide for public notice and comment on ETC applications, but limit consideration of any submissions to the adequacy or accuracy of the certification made to satisfy the statutory criteria. Given the limited focus of the Commission's inquiry under Section 34(a)(1), the Commission believed that it would be inappropriate to allow persons to raise issues that fall outside the purview of the statutorily fixed determination, and that go to the public interest merits of an applicant's proposed entry. Comments on the adequacy of the representations may include whether the application is within the scope of the ETC criteria -- *e.g.*, the extent to which applicant's services constitute telecommunications services or products, information services or products, certain services subject to FCC jurisdiction, or services or products related or incidental to these services or products. Applicants would then have the opportunity to respond to any comments filed. Finally, the Commission also requested comments on the length of the time period which should be set for such comments.[87]

2. Comments

50. Commenters were strongly divided on these issues. On the one hand, several commenters disagree with the Commission's tentative conclusion to limit comments to the adequacy or accuracy of the representations contained in ETC applications. For example, New Orleans argues that commenters should be able to submit additional information -- *e.g.* evidence of impermissible activities not referenced in the application -- related to the requirements of obtaining ETC status and related to the Commission's regulation of these new

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[85] In addition, in response to an informal inquiry made to staff in FERC's Office of General Counsel responsible for such matters by Commission staff, FERC staff did not request that FERC be served with copies of ETC applications. *See* August 8, 1996 Memorandum from Commission staff to William F. Caton, Acting Secretary.

[86] NPRM at ¶ 13.

[87] *Id.*

entities.[88] Similarly, MCI argues that interested parties should also be able to provide information indicating whether the applicant has engaged in anticompetitive actions with regard to its ratepayers, shareholders, or potential competitors in its preparation for entry into the telecommunications business.[89] Finally, ACSI argues that the Commission should give ETC commenters at least 30 days from public notice to file comments, because the 15 day interval is inadequate to allow interested parties to investigate and comment meaningfully on ETC applications.[90]

51. Entergy states that while there is value in providing for public notice and comment, the Commission should continue to limit comments to the adequacy and accuracy of representations used to demonstrate that an applicant's planned activities are within the scope of the statutory criteria.[91] Entergy argues that the Commission should not consider comments that raise issues outside the purview of the statutorily fixed determination, such as comments relating to the costs of the applicant's business activities, the applicant's proposed financing arrangements, or comments raising public policy considerations. Moreover, Entergy argues that without supporting evidence, mere allegations challenging the information presented by an applicant should not cause the Commission to deny an application. Finally, Entergy argues that given the limited focus of the Commission's review and the goal of developing a streamlined ETC process, the Commission should limit the comment period to 25 days or less and that the Commission should not entertain any requests for hearing.[92]

3. Discussion

52. Upon review, we reject arguments that we should expand the scope of comments beyond the adequacy and accuracy of the representations contained in the application. As we have said numerous times in evaluating ETC applications, and have reiterated above, it is not our role to examine the public interest merits of holding company entry. Moreover, comments on the adequacy and accuracy are not as limited as commenters appear to believe. For example, New Orleans' argument that commenters should be able to file additional information -- *e.g.* evidence of impermissible activities not referenced in the application -- related to the requirements of obtaining ETC status, is exactly the type of information relevant to the Commission's consideration of an ETC application.

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[88] New Orleans Comments at 6-7. *See also* ACSI Comments at 10-11.

[89] MCI Reply at 5-6.

[90] *Id.* at 11.

[91] Entergy Comments at 10-11.

[92] *Id.*

53. On the other hand, we reject MCI's suggestion that interested parties should also be able to provide information indicating whether the applicant has engaged in anticompetitive actions with regard to its ratepayers, shareholders, or potential competitors in its preparation for entry into the telecommunications business. Such information has no relevance to our ETC determination. The type of information that MCI would proffer has no relationship with the ETC statutory criteria.

54. Finally, we believe that the time period proposed in the draft rules is adequate for effective notice and comment. Indeed, given: (a) the limited focus of the Commission's inquiry under the statute; (b) that we only have sixty days to complete this inquiry; and (c) that the statute does not require public comment, we believe that fifteen days is sufficient for interested parties to file comments on the adequacy and accuracy of the representations contained in the application. Our experience to date indicates that entities wishing to oppose ETC applications are able to present their arguments within this time frame.

D. Implementation Issues

1. Notice to State Commissions

a. The NPRM

55. Proposed Section 1.4005 requires the Secretary of the Commission to notify the SEC whenever an application for ETC status is granted, as explicitly required by Section 34(a)(1) of PUHCA.

b. Comments

56. Southwestern Bell argues that the Commission should modify proposed rule 1.4005 to require the Commission to also inform affected state commissions, in addition to the SEC, whenever it determines that an entity is an ETC. According to Southwestern Bell, this step would serve as further notice to the states that they may need to take additional actions to implement, in their states, the requirements of the 1996 Act.[93]

c. Discussion

57. We reject Southwestern Bell's argument that the Commission should also notify affected state commissions whenever the Commission determines that an applicant merits ETC status. We believe that requiring applicants to serve affected state commissions with their applications should constitute adequate notice to the states. Indeed, our reasoning behind this requirement is that if applicants serve affected state commissions when they file for a determination of ETC status, then states will have an opportunity, if they so desire, to

[93] Southwestern Bell at 1-2.

meaningfully participate in our proceeding or monitor its status. We believe this procedure is especially appropriate given our previous determination that applicants are not required to obtain prior state approval before they file with this Commission. Accordingly, we reject Southwestern Bell's argument.

2. Change in Circumstances

a. The NPRM

58. In the NPRM, the Commission noted that an ETC determination is based on the facts that are presented to the Commission, and therefore any material variation from those facts may render an ETC determination invalid.[94] Accordingly, proposed Section 1.4006 requires ETCs, within 30 days of any material change in facts that may affect an ETC's eligibility for ETC status under Section 34(a)(1) to either: (a) apply to the Commission for a new determination of ETC status; (b) file a written explanation with the Commission of why the material change in facts does not affect the ETC's status; or (c) notify the Commission that it no longer seeks to maintain ETC status. To the extent persons other than the ETC applicant inform the Commission of a material change of circumstances, the ETC will be given the opportunity to respond and the Commission will take further action as appropriate.[95]

b. Comments

59. Southern criticizes the proposed rules requiring notification after a "material" change in facts.[96] Southern states that while it does not take issue with the general concept, the meaning of "material" is open to different interpretations. According to Southern, this could result in unnecessary uncertainty for ETCs and could be used by third parties to impede the creation of ETCs by the filing of specious claims. Accordingly, Southern urges the Commission to give more guidance on the phrase "material change in circumstance." Southern believes that an ETC should, for example, be able to expand service offerings (*e.g.*, adding long-haul fiber to a wireless service it may already be providing) without this being considered a "material" change in circumstances. Southern also encourages the Commission to establish a presumption favoring ETC status in the context of such challenges and to resolve such contentions in the spirit of Congressional intent underlying Section 34.[97]

60. Similarly, Cinergy argues that the rules should expressly provide that notification of a material change in facts is required only if such change calls into question

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[94] NPRM at ¶ 16.

[95] *Id.*

[96] Southern Comments at 6-7.

[97] *Id.*

the continuing validity of the sworn statement under Section 1.4002(a)(2) of the proposed regulations.[98] Cinergy argues that this requirement does not apply with respect to the "brief description of planned activities," which is intended for illustrative purposes only. Therefore, argues Cinergy, the fact that an applicant may subsequently choose not to pursue the particular activities described in response to Section 1.4002(a)(1) should not affect its status as an ETC so long as it continues to engage in other ETC authorized activities.[99]

61. Entergy also does not object in principle to the proposed notification rules regarding a material change in facts.[100] However, Entergy argues that a material change in circumstances which is only of temporary duration should not negate ETC status -- *i.e.*, an ETC seeks to acquire other interests in other predominantly telecommunications companies that incidentally engage in certain non-qualifying business activities. Entergy submits that, under these circumstances, the acquiring ETC should be permitted (in support of the required explanation that the acquisition does not or should not affect its ETC status) to represent that it will divest or discontinue any non-qualifying business operations within a reasonable period of time following completion of the proposed acquisition.[101]

62. BellSouth disputes both Cinergy's and Entergy's arguments.[102] Specifically, BellSouth contends that if an ETC departs from the "brief description" of the planned activities contained in proposed rule 1.4002, that would constitute "a material change in facts." BellSouth argues that if an applicant certifies that it intends to undertake a certain set of permissible activities, but nonetheless subsequently undertakes a wholly different set of permissible activities, such actions render the ETC application process meaningless.[103]

63. BellSouth argues that the proposed rules should provide an opportunity for interested persons to comment in connection with any filing in which the ETC asserts that materially changed circumstances do not affect its ETC status. Accordingly, BellSouth argues that the proposed rules should be changed to provide for a reasonable period of time (fifteen days) for interested parties to comment on the matter.[104] Southern disagrees with BellSouth's proposal. Southern argues that the Commission has the authority to place matters on public

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[98] Cinergy Comments at 4; *see also* Southern Reply at 10-11.

[99] *Id.*

[100] Entergy Comments at 12-13.

[101] *Id.*

[102] BellSouth Reply at 5-6.

[103] *Id.*

[104] BellSouth Comments at 14-15.